Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-751

In the Supreme Court of the United States

OCTOBER TERM, 1987

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
LOUIS R. COHEN
Deputy Solicitor General
MICHAEL K. KELLOGG
Assistant to the Solicitor General
BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether an employee of the National Security Agency who fails to maintain a required clearance for access to classified information may be removed "for cause," without invocation of 5 U.S.C. 7532 or 50 U.S.C. 833.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	2
A. The statutory and regulatory framework	2
B. Proceedings below	6
Summary of argument	10
Argument:	
The Director of NSA may, without invoking the summary dismissal procedures of 5 U.S.C. 7532 or 50 U.S.C. 833, remove "for cause" an employee who fails to maintain a required clearance for access to classified information	14
A. The Director of NSA is empowered to remove employees for cause, including lack of a required security clearance	15
B. The authority of the Director of NSA to remove employees for cause is not limited by 50 U.S.C. 833	24
C. The authority of the Director of NSA to remove employees for cause is not limited by 5 U.S.C. 7532	26
Conclusion	41

TABLE OF AUTHORITIES

Cases:

Almazan v. *Department of Air Force*, 26 M.S.P.R. 318 (1985)	19
Arnett v. *Kennedy*, 416 U.S. 134 (1974)	16
Buriani v. *Department of Air Force*, 777 F.2d 674 (Fed. Cir. 1985)	19
Cafeteria Workers v. *McElroy*, 367 U.S. 886 (1961)	16
Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985)	18
Cole v. *Young*, 351 U.S. 536 (1956)	*passim*
Crenshaw v. *United States*, 134 U.S. 99 (1890)	16
De Castro v. *Board of Comm'rs*, 332 U.S. 451 (1944)	16

Cases – Continued: Page

Egan v. *Department of Navy*, 28 M.S.P.R. 509 (1985), rev'd, 802 F.2d 1563 (Fed. Cir. 1986), rev'd, No. 86-1552 (Feb. 23, 1988) 13, 18, 21-22, 34, 35, 37, 38, 39
Hennen, Ex parte, 38 U.S. (13 Pet.) 230 (1839) 16
Hoska v. *Department of Army*, 677 F.2d 131 (D.C. Cir. 1982) 22
Jackson v. *United States Postal Service*, 666 F.2d 258 (5th Cir. 1982) 19
Keim v. *United States*, 177 U.S. 290 (1900) 16
Molerio v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984) 22
Shurtleff v. *United States*, 189 U.S. 311 (1903) 16
Stalans v. *National Security Agency*, 678 F.2d 482 (4th Cir. 1982) 22
Tennessee v. *Dunlap*, 426 U.S. 312 (1976) 19
United States v. *Fausto*, No. 86-595 (Jan. 25, 1988) ... 14, 17, 36
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 17
Womer v. *Hampton*, 496 F.2d 99 (5th Cir. 1974) 19
Zimmerman v. *Department of Army*, 755 F.2d 156 (Fed. Cir. 1985) 19

Statutes, regulations and rules:

Act of June 28, 1940, ch. 440, § 6, 54 Stat. 679 31
Act of Dec. 17, 1942, ch. 739, § 3, 56 Stat. 1053 31
Act of Aug. 26, 1950, ch. 803, 64 Stat. 476 13
§ 1, 64 Stat. 476-477 27
§ 2, 64 Stat. 477 32
Act of Mar. 26, 1964, Tit. III:
Pub. L. No. 88-290, § 306(a), 78 Stat. 170 ..... 16, 17
50 U.S.C. 831 *et seq.* 2
50 U.S.C. 831 ..... 3, 9, 19, 20, 23, 39, 40
50 U.S.C. 832 ..... 9, 19
50 U.S.C. 832(a) 3, 4, 14, 19, 21, 24, 25
50 U.S.C. 832(b) 3, 4, 7, 20, 21, 23, 25
50 U.S.C. 833 ..... 8, 9, 10, 24, 25, 26

Statutes, regulations and rules – Continued: Page

50 U.S.C. 833(a) 6, 9, 11, 12, 14, 15, 26, 27
Atomic Energy Act of 1946, ch. 724, § 12(a)(4), 60 Stat. 771 ..... 31, 32
Civil Service Reform Act of 1978:
Ch. 23, 5 U.S.C. 2301 *et seq.*:
5 U.S.C. 2302(a)(2)(C)(ii) 17
Ch. 43, 5 U.S.C. 4301 *et seq.*:
5 U.S.C. 4301(1)(C)(ii) 17
Ch. 73, 5 U.S.C. 7301 *et seq.*:
5 U.S.C. 7312 ..... 1, 5, 28
Ch. 75, 5 U.S.C. 7501 *et seq.*:
5 U.S.C. 7501(1) 18
5 U.S.C. 7511-7513 ..... 1, 3, 10
5 U.S.C. 7511(a) 3, 17
5 U.S.C. 7511(a)(1)(B) 3, 18
5 U.S.C. 7511(a)(2) 14
5 U.S.C. 7512 25
5 U.S.C. 7512-7513 39
5 U.S.C. 7513 ..... 3, 14, 35
5 U.S.C. 7513(a) 17
5 U.S.C. 7531 ..... 5, 31
5 U.S.C. 7532 ..... *passim*
5 U.S.C. 7532(a) 5, 12, 30
5 U.S.C. 7532(b) 5, 27
5 U.S.C. 7532(c)(3)(A) 34
5 U.S.C. 7532(c)(3)(C) 5, 34
5 U.S.C. 7533 32
Department of State Appropriation Act, 1947, 541, 60 Stat. 458 31
Department of State Appropriation Act, 1948, ch. 211, 61 Stat. 279 31
Department of State Appropriation Act, 1949, ch. 400, § 104, 62 Stat. 315 31
Department of State Appropriation Act, 1950, ch. 354, § 104, 63 Stat. 456 31
Lloyd-La Follette Act, ch. 389, § 6, 37 Stat. 555, 5 U.S.C. (1964 ed.) 652 16

Statutes, regulations and rules – Continued: Page

National Military Establishment Appropriation Act, 1950, ch. 787, § 630, 63 Stat. 1023 31
National Security Agency Act of 1959, 50 U.S.C. 402 note 1-2, 8
§ 2 ..... 2, 15
Veteran's Preference Act of 1944, ch. 287, § 14, 58 Stat. 390, 5 U.S.C. (1946 ed.) 863 ..... 16, 21
Exec. Order No. 10,450, § 1, 3 C.F.R. 936 (1949-1953 comp.) 5
Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.) 16
NSA Reg. No. 30-4 (June 22, 1964) 20
Civil Service Rules § 1.4(a), *reprinted in* 5 U.S.C. 3301 note 17

Miscellaneous:

96 Cong. Rec. 10028 (1950) 30
Director of Central Intelligence Directive No. 1/14 (Sept. 1, 1983) 20, 23, 37
DoD Directive:
No. 5100.23 (May 17, 1967) 2, 15
No. 5210.45 (May 9, 1964) 2, 20, 25
49 Fed. Reg. 48623 (1984) 38
50 Fed. Reg. 2355 (1985) 38
H.R. Rep. 2264, 80th Cong., 2d Sess. (1948) 30, 31
H.R. Rep. 2330, 81st Cong., 2d Sess. (1950) 27, 30, 31
H.R. Rep. 108, 85th Cong., 1st Sess. (1963) 17
National Security Agency Personnel Management Manual (Aug. 12, 1980) 2, 3, 18, 23
Report of the Comm'n on Government Security, S. Doc. 64, 85th Cong., 1st Sess. (1957) 5
Security Comm. of the Central Intelligence Agency, *Sensitive Compartmented Information: Characteristics and Security Requirements* (June 1984) 4
S. Rep. 1155, 80th Cong., 2d Sess. (1948) 30
S. Rep. 2158, 81st Cong., 2d Sess. (1950) 27, 30, 31

Miscellaneous – Continued: Page

Hearing on S. 1561 and S. 1570 Before a Subcomm. of the Senate Comm. on Armed Services, 80th Cong., 2d Sess. (1948) 29, 32

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-751

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 820 F.2d 1275. The opinion of the district court (Pet. App. 17a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a-23a) was entered on June 9, 1987. A petition for rehearing was denied on August 18, 1987 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on November 4, 1987, and was granted on February 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions, 5 U.S.C. 7312, 7511-7513 and 7532, and relevant portions of the National

Security Agency Act of 1959, 50 U.S.C. 402 note, the Act of Mar. 26, 1964, Tit. III, 50 U.S.C. 831 *et seq.*, and Chapter 370 of the *National Security Agency Personnel Management Manual* 30-2 (Aug. 12, 1980) are set forth in Pet. App. 26a-43a.

STATEMENT

A. The Statutory And Regulatory Framework

1. The National Security Agency was established by Presidential Directive in 1952 as a separately organized intelligence agency within the Department of Defense. The National Security Agency Act of 1959, 50 U.S.C. 402 note (the 1959 NSA Act), gave the Secretary of Defense, or his designee, the power "to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees * * * as may be necessary to carry out the functions of such agency" (§ 2, 50 U.S.C. 402 note). In DoD Directive No. 5100.23 (May 17, 1967) (C.A. App. 56-58),[1] the Secretary of Defense delegated his authority under the 1959 NSA Act to the Director of NSA. The Director has, in turn, promulgated regulations governing personnel matters. *National Security Agency Personnel Management Manual* (NSA/PMM) 30-2 (Aug. 12, 1980). Chapter 370 of these regulations (Pet. App. 36a-43a) sets forth the general standards and procedures for removing an employee.

By virtue of the 1959 NSA Act, NSA employees are in the "excepted service" rather than the "competitive service." This means that unless they are preference-eligible veterans they are not covered by Subchapter II of Chapter 75 of the Civil Service Reform Act of 1978

[1] "C.A. App." refers to the Joint Appendix filed in the court of appeals, copies of which have been lodged with the Clerk.

(CSRA), 5 U.S.C. 7511-7513. Chapter 370 of the NSA regulations provides, however, that an NSA employee may be removed for "such cause as will promote the efficiency of the service" (NSA/PMM § 370.3-4), a standard for removal identical to that for competitive-service employees covered by Subchapter II. NSA employees also enjoy by regulation many of the same procedural protections afforded to the competitive service by Subchapter II of the CSRA, including the right to advance written notice of an adverse action, a statement of reasons for the action, an opportunity to respond and be represented by counsel, and a written decision (compare NSA/PMM §§ 370.3-5 to 370.3-7 with 5 U.S.C. 7513). Preference-eligible veterans employed at NSA, like other preference-eligible federal employees (see 5 U.S.C. 7511(a)(1)(B)), have the right to appeal an adverse action to the Merit Systems Protection Board (MSPB) (NSA/PMM § 370.3-8a(1)). Nonveterans at NSA, however, may not appeal adverse actions to the MSPB (§ 370.3-8a(2)), just as other nonveterans in the excepted service have no right of MSPB appeal under the CSRA (see 5 U.S.C. 7511(a)).

2. NSA is responsible for conducting intelligence activities of the United States Government relating to communications and computer security. Because of the sensitive nature of the tasks performed by NSA, the Secretary of Defense is statutorily directed to ensure that no person is employed by the Agency, or granted access to classified information, unless such employment or such access is "clearly consistent with the national security" (50 U.S.C. 831). In particular, subject to specified exceptions, no person may be employed "unless he has been the subject of a full field investigation" (50 U.S.C. 832(a)). Subsection (b) of the same section provides for boards of appraisal to assist the Secretary and the Director of NSA in making ac-

cess determinations and further provides that "[n]o person shall be cleared for access to classified information, contrary to the recommendations of any such board, unless the Secretary (or his designee for such purpose) shall make a determination in writing that such employment * * * is in the national interest" (50 U.S.C. 832(b)).

All employees at NSA are required to be cleared for access to Sensitive Compartmented Information (SCI), which includes "data about sophisticated technical systems for collecting intelligence and information collected about those systems." Security Comm. of the Central Intelligence Agency, *Sensitive Compartmented Information: Characteristics and Security Requirements* (June 1984), *reprinted in* Pet. App. 44a-51a (SCI Characteristics).[2] The standards and criteria for access to SCI are "more rigorous and stringent" than those for a top secret clearance, and individuals who have been granted top secret clearances may nonetheless be denied access to SCI (*id.* at 48a).[3]

3. Heads of various agencies, including the Department of Defense, have the power to suspend and thereafter to remove any employee when they determine that such action is necessary or advisable in the interests of national security. Section 7532 of Title 5, United States Code, provides that "the head of an agency" may summarily suspend an employee without pay when he considers such action "necessary in the interests of national

[2] Clearance for "access to sensitive cryptologic information or material" is a statutory requirement of employment at NSA, except that conditional employment without such access may be granted pending completion of a full field investigation. See 50 U.S.C. 832(a).

[3] "Because of the extreme vulnerability to countermeasures of the operations covered by SCI control systems, * * * a substantially more vigorous personnel screening process is necessary and a determination standard beyond that for other classified information must be used" (SCI Characteristics, Pet. App. 50a-51a).

security" and may remove a suspended employee when, after following specified procedures, he determines that removal is "necessary or advisable in the interests of national security." 5 U.S.C. 7532(a) and (b).[4] With certain exceptions, an employee suspended under this section is entitled to notice of the reasons for the suspension and an opportunity to respond, a hearing "by an agency authority duly constituted for the purpose" (5 U.S.C. 7532(c)(3)(C)), and a written decision. Neither a suspension nor a removal under Section 7532 is subject to outside review. *Cole* v. *Young*, 351 U.S. 536, 546 (1956). An employee removed under Section 7532 is not eligible for any position in the agency and may not be appointed to any position elsewhere in the government except after consultation with the Office of Personnel Management (OPM) (5 U.S.C. 7312).

Congress also gave the Secretary of Defense broad and unreviewable discretion to remove any NSA employee when he considers such action to be in the interest of the

[4] 5 U.S.C. 7531 contains a list of specific agencies and departments to which Section 7532 applies, but also provides that Section 7532 will apply to any "such other agency * * * as the President designates in the best interests of national security." By Executive Order, the President has extended Section 7532 "to all other departments and agencies of the Government." Exec. Order No. 10,450, § 1, 3 C.F.R. 936 (1949-1953 comp.). In *Cole* v. *Young*, 351 U.S. 536, 551 (1956), however, this Court held that "a condition precedent to the exercise of th[is] dismissal authority is a determination by the agency head that the position occupied is one affected with the 'national security' "—a determination, the Court made clear (*id.* at 548 (footnote omitted)), that will only be possible in agencies with "a close and immediate concern with the defense of the Nation." Following *Cole*, the Attorney General instructed federal agencies to limit removal proceedings under Executive Order No. 10,450 to employees who hold sensitive positions. *Report of the Comm'n on Government Security*, S. Doc. 64, 85th Cong., 1st Sess. 35 (1957).

United States and determines that compliance with the removal procedures set forth in other provisions of law would not be consistent with national security. 50 U.S.C. 833(a) provides:

> Notwithstanding Sections 7512 and 7532 of title 5, or any other provision of law, the Secretary may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

B. Proceedings Below

1. Respondent, a nonveteran, was employed at NSA from 1968 to 1984 as a cryptographic material control technician (Pet. App. 2a). In 1982 he disclosed to NSA security officials that he had engaged in homosexual relations with unnamed individuals, including foreign nationals (*ibid.*). Respondent was subsequently notified pursuant to NSA regulations of his proposed removal from employment on the ground that his continued access to SCI was not clearly consistent with the interests of national security (C.A. App. 83). The notice advised respondent that he had a right to respond, to be represented by counsel, and to review the information upon which the Agency relied in reaching its decision (*id.* at 83-84). The notice also advised respondent that he would be retained in pay status during the adjudication process but that he would not be permitted access to SCI (*id.* at 84).

Through counsel, respondent answered and offered to undergo a psychiatric evaluation to demonstrate that he

did not pose a security risk (Pet. App. 2a). The Agency agreed to the psychiatric evaluation (*id.* at 3a) and, in the meantime, convened a board of appraisal pursuant to 50 U.S.C. 832(b) to determine whether respondent's continued access to SCI was clearly consistent with the national security (Pet. App. 3a). Based on a detailed report of the psychiatrist in response to questions from the board (C.A. App. 101, 110-113), the board ultimately concluded that respondent's continued access to SCI was not clearly consistent with the interests of national security (Pet. App. 3a). The board recommended, however, that in view of respondent's satisfactory job performance the Agency assist him in finding employment outside NSA (*id.* at 3a-4a).

Respondent's counsel filed a lengthy brief (C.A. App. 121-144) together with summaries of interviews and letters of respondent's acquaintances attesting generally to his good character and trustworthiness (*id.* at 147-174, 183-190). Respondent and his counsel also had a hearing before the Director of NSA at which respondent challenged the decision to withdraw his access to SCI (*id.* at 191). Following consideration of all of respondent's submissions, the Director determined to revoke respondent's eligibility for access to SCI and explained his reasons for doing so in a written decision (*id.* at 191-192). The Director noted the history of respondent's sexual relations with foreign nationals and concluded (*id.* at 192) that "it is the indiscriminate pattern of [respondent's] activity which invites the risk of security exploitation rather than the specific homosexuality of it." Since SCI clearance was a condition of respondent's job and all other jobs at NSA, the Director, relying on the authority delegated to him under the 1959 NSA Act, ordered that respondent be removed (Pet. App. 4a).

Respondent's counsel requested a pre-removal hearing pursuant to 5 U.S.C. 7532 (Pet. App. 4a). This request was directed to the Secretary of Defense as well as to the Director of NSA (C.A. App. 216-219). Both NSA and the Department of Defense replied that respondent's removal was "for cause" pursuant to NSA regulations and was not pursuant to the Secretary's summary authority under either 50 U.S.C. 833 or 5 U.S.C. 7532 (C.A. App. 220, 221). Respondent renewed his request for a Section 7532 hearing, and also contended that the appointment authority provided in the 1959 NSA Act, 50 U.S.C. 402 note, and delegated to the Director of NSA, did not include any authority to remove employees (C.A. App. 222, 223). The renewed request was denied (*id.* at 224, 225), and respondent's employment was terminated effective March 9, 1984 (*id.* at 226).

2. Respondent then filed suit in the district court contending that his removal violated various constitutional and statutory rights. He argued, inter alia, that the Director had no statutory authority to remove him under the 1959 NSA Act and that, unless the Secretary proceeded under NSA's special summary authority (50 U.S.C. 833), the only available statutory authority for his removal was 5 U.S.C. 7532. He sought reinstatement to his job or a remand to the Agency for a full hearing at which he could challenge the decision to revoke his clearance for access to SCI.

The district court granted summary judgment for petitioners (Pet. App. 17a-20a). The court held, inter alia, that respondent was properly removed "for cause" pursuant to the 1959 NSA Act and NSA's implementing regulations. The court concluded that the power to remove is inherent in the power to appoint, and that, although the Secretary could have elected to proceed under NSA's summary

authority in 50 U.S.C. 833, it was not required to do so. The court noted that NSA had in fact provided respondent with greater procedural safeguards by proceeding under its "for cause" regulations than he would have received under 50 U.S.C. 833 (Pet. App. 20a). The court concluded that NSA was similarly not required, merely because the removal implicated national security concerns, to utilize the summary procedures of 5 U.S.C. 7532 (Pet. App. 20a).

3. The court of appeals reversed the district court's decision with respect to the applicability of 5 U.S.C. 7532 and vacated the remainder of the decision (Pet. App. 1a-16a). The court held that the Director of NSA has no authority to remove an employee for cause where the cause for the removal is related to national security. Rather, the court held, an NSA employee may be removed on national security grounds only by the Secretary of Defense acting in person under either 5 U.S.C. 7532 or 50 U.S.C. 833(a).

The court noted (Pet. App. 9a) that the 1959 NSA Act gave the Secretary and his designee no explicit authority to remove NSA employees. The court reasoned that since Section 7532 predated the creation of NSA, any implied removal authority granted to NSA must be limited by Section 7532. "Whatever implicit firing authority may ordinarily be conferred by an explicit grant of hiring authority," the court of appeals stated (Pet. App. 10a), "in this case the 1959 [NSA] Act cannot override a congressional statute that expressly controls terminations in the interests of national security."

The court further held (Pet. App. 10a-13a) that 50 U.S.C. 831 and 832, which prohibit employment of any person at the Agency in a position involving access to classified information unless such access is "clearly consis-

tent with the national security," do not authorize the removal for cause of an employee who fails to maintain his eligibility for such access. "Congress," the court stated (Pet. App. 12a), "did not allow the agency to revoke an employee's security clearance pursuant to § 832(b) and then subsequently dispense with the procedures for dismissing the employee under § 7532." The court of appeals noted that Congress provided NSA with an explicit statutory removal authority (50 U.S.C. 833), but since NSA did not use that authority, the only means of removing respondent in the interests of national security was Section 7532. The court therefore remanded to the Agency for compliance with Section 7532.

SUMMARY OF ARGUMENT

NSA employees are in the "excepted service" for purposes of the CSRA. NSA employees who are preference-eligible veterans are covered by Subchapter II of Chapter 75 of the CSRA (5 U.S.C. 7511-7513), which provides that covered employees may be removed only "for such cause as will promote the efficiency of the service" and establishes substantive and procedural protections governing removals of such employees. Respondent, a non-veteran, was not covered by Subchapter II and had *no* statutory tenure protection. NSA, however, has provided by regulation that its employees may ordinarily be removed only for cause and has prescribed procedural protections (including notice and an opportunity to respond) in connection with "for cause" removals.

As a general rule, failure to satisfy a legal requirement for a position constitutes "cause" for removal from that position. Clearance for access to SCI is a statutory requirement for employment at NSA. It follows that loss of that clearance is "cause" for removal. When NSA determined, after full compliance with its procedures governing the removal of non-preference-eligible employees, that it was no longer clearly consistent with the interests of national security for respondent to have access to SCI, he was removed for cause on the ground that he no longer met a statutory requirement for his job.

Two special statutory provisions, 5 U.S.C. 7532 and 50 U.S.C. 833(a), give the Secretary of Defense the authority, in specified circumstances, to remove an NSA employee on security grounds. The court of appeals, in large part because respondent did *not* have other statutory protection, ruled that NSA could not remove respondent "for cause" but must invoke and follow either Section 7532 or Section 833(a). But, apart from the fact that respondent received greater protections under NSA regulations than either of these statutes affords, the court of appeals stood the relationship between ordinary employee tenure and these two special provisions on its head: Sections 7532 and 833(a) were enacted to enable agencies to bypass statutory and other protections of employees when national security considerations require; they are not exclusive procedures for removing on security grounds someone who could otherwise be removed at will or pursuant to valid regulations.

Section 833(a) says only that the Secretary "may" terminate an individual's employment under certain conditions; it does not purport to afford a mandatory procedure. To the contrary, in order to invoke Section 833(a), the Secretary of Defense must find that "the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security." This language clearly implies not only that removals may be effected under "other provisions of law" but also that

other provisions are to be used unless the procedures they prescribe would themselves threaten national security. Section 833(a) specifically states that where the specified conditions are met an NSA employee may be removed notwithstanding the statutory provision (Subchapter II of Chapter 75) that gives preference eligibles the right to be removed only for cause; it thus allows the Secretary of Defense to bybass the requirement of cause and related procedures set forth in Subchapter II where security considerations require; it does not in any way bar removals for cause.

Section 7532 states that an agency head "may" suspend and thereafter remove an employee in specified circumstances; like Section 833(a) it is not by its terms a mandatory procedure in any case. Section 7532 may be invoked "[n]otwithstanding any other statutes," but nothing in Section 7532 purports to preclude removal actions taken pursuant to "any other statutes." The court of appeals' statement (Pet. App. 9a) that the ordinary "for cause" procedures cannot be used to "bypass" 7532 inverts the relationship between Subchapter II and Section 7532. Section 7532 was designed to enable the head of an agency to bypass the ordinary procedures for suspending and removing protected employees if he determines that summary action is "necessary in the interests of the national security" (5 U.S.C. 7532(a)). It was not designed to provide employees who do not otherwise have statutory tenure with across-the-board protections against dismissals in the interests of national security.

The court of appeals apparently believed that respondent would receive more protection under Section 7532 than in a "for cause" removal, and that therefore the former procedure must displace the latter. But the premise is wrong and the conclusion does not follow: respondent

received greater protection under NSA regulations than he would have received had the "harsh and drastic" procedures of Section 7532 been invoked (*Department of Navy* v. *Egan,* No. 86-1552 (Feb. 23, 1988), slip op. 14); and the fact that non-preference-eligible employees in the excepted service have *no* statutory tenure protection does not turn Section 7532, a supplementary procedure applicable to a wide range of federal employees, into an exclusive means of removing NSA personnel.

This Court stated in *Cole* v. *Young*, 351 U.S. at 543-544, that employees could be dismissed for cause based on doubts about their loyalty without invoking the summary removal authority granted to agency heads by the predecessor of Section 7532 (the Act of Aug. 26, 1950, ch. 803, 64 Stat. 476). Indeed, the Court stressed (351 U.S. at 546) that "[i]n the absence of an immediate threat of harm to the 'national security,' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears." The decision of the court of appeals is inconsistent with *Cole* and with recent decisions of the MSPB and the Federal Circuit, which have wide responsibility for federal personnel matters. See *Egan* v. *Department of Navy,* 28 M.S.P.R. 509 (1985), aff'd on this point but rev'd on other grounds, 802 F.2d 1563 (Fed. Cir. 1986), rev'd, No. 86-1552 (Feb. 23, 1988).

The court of appeals' ruling would lead to mischief extending well beyond NSA. Neither the court of appeals nor respondent has suggested any reason why, if Section 7532 displaces the "for cause" removal authority of NSA where the "cause" involves national security, it would not similarly displace the "for cause" provisions applicable to competitive-service employees and veterans at other agencies. If it does, then every routine decision to revoke a required clearance would require procedures suitable to an

immediate threat to national security, including the personal attention of the head of the agency.

ARGUMENT

THE DIRECTOR OF NSA MAY, WITHOUT INVOKING THE SUMMARY DISMISSAL PROCEDURES OF 5 U.S.C. 7532 OR 50 U.S.C. 833, REMOVE "FOR CAUSE" AN EMPLOYEE WHO FAILS TO MAINTAIN A REQUIRED CLEARANCE FOR ACCESS TO CLASSIFIED INFORMATION

Respondent was a non-preference-eligible in the "excepted service." As such, like many similarly situated federal employees, he had *no* statutory tenure protection, see 5 U.S.C. 7511(a)(2); cf. *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988). NSA regulations, however, provided that he could be removed only "for such cause as will promote the efficiency of the service" (NSA/PMM § 370.3-4). The court of appeals, in large part because of respondent's very lack of other statutory protection, ruled that NSA must follow either 5 U.S.C. 7532 or 50 U.S.C. 833(a) in removing him. But apart from the fact that respondent received greater protections under NSA regulations than either of these statutes affords (see pp. 33-36, *infra*), the court of appeals inverted the statutory logic: Sections 7532 and 833(a) were enacted to enable agencies to bypass statutory and other protections of employees when national security considerations require; they are not exclusive procedures for removing on security grounds someone who could otherwise be removed at will or pursuant to valid regulations.

Three different procedural paths may lead to the removal of an NSA employee for security-related reasons: an employee who loses his security clearance may be removed "for cause" under Chapter 370 of the NSA regulations (or under 5 U.S.C. 7513 if he is a veteran) because he

does not meet a statutory requirement of his job; an NSA employee may be suspended and removed under 5 U.S.C. 7532 when the Secretary of Defense considers such action "necessary or advisable in the interests of national security"; and the Secretary may terminate the employment of an NSA employee under 50 U.S.C. 833(a) when he "considers that action to be in the interest of the United States" *and* determines that other termination procedures "cannot be invoked consistently with the national security." These procedures have different historical origins, apply to different groups of federal employees (although each group includes NSA employees), are available in different circumstances, and afford different procedural protections. Each procedure is by its terms permissive, rather than mandatory, and Sections 7532 and 833(a) advert expressly to other removal procedures. The court of appeals' ruling that Section 7532 "controls terminations in the interests of national security" and makes "for cause" removal unavailable in any case touching upon security matters is unsupported by text or history and would impose an inappropriate limitation on agencies' ability to remove employees who fail to meet a qualification for their jobs.

A. The Director Of NSA Is Empowered To Remove Employees For Cause, Including Lack Of A Required Security Clearance

1. In the 1959 NSA Act, Congress granted to the Secretary of Defense the power "to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees * * * as may be necessary to carry out the functions of [NSA]" (§ 2, 50 U.S.C. 402 note).[5] As a general matter, the power to fire

[5] The Secretary has delegated his appointment and removal authority to the Director of NSA. See Delegations of Authority in DoD Directive 5100.23 (C.A. App. 60-65). The Secretary reserved to

is, unless expressly circumscribed, inherent in the power to hire. The district court so noted (Pet. App. 20a), and this Court has so recognized for 150 years. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); *Crenshaw* v. *United States*, 134 U.S. 99, 108 (1890); *Keim* v. *United States*, 177 U.S. 290, 293-294 (1900); *Shurtleff* v. *United States*, 189 U.S. 311, 315 (1903); *De Castro* v. *Board of Comm'rs*, 322 U.S. 451, 462 (1944); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961); *Arnett* v. *Kennedy*, 416 U.S. 134, 148 (1974) (plurality opinion); *id.* at 181 (White, J., concurring in part and dissenting in part). Nothing in the 1959 NSA Act, or its subsequent amendments, suggests that Congress intended to circumscribe in any way the authority of the Secretary of Defense or his designee to remove employees.

In the Act of Mar. 26, 1964, Pub. L. No. 88-290, § 306(a), 78 Stat. 170, Congress amended the 1959 NSA Act to provide explicitly that the authorities granted therein were to be exercised "without regard to the civil service laws." At that time, the civil service laws provided competitive-service employees with certain tenure rights,[6] and the intended effect of the 1964 amendment was to ensure that NSA employees, other than preference-eligible veterans,[7] would have no tenure rights in their employ-

himself certain specific statutory removal authorities, including the summary dismissal power granted by 5 U.S.C 7532.

[6] Competitive-service employees had the right, under Section 6 of the Lloyd-La Follette Act, ch. 389, 37 Stat. 555, 5 U.S.C. (1964 ed.) 652 to be dismissed only for cause. Such employees also had a right, but only by Executive Order, to appeal a dismissal to the Civil Service Commission. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.).

[7] Preference-eligible veterans had by statute both the right to be dismissed only "for such cause as will promote the efficiency of the service" and the right "to appeal to the Civil Service Commission." Veterans' Preference Act of 1944, ch. 287, § 14, 58 Stat. 390, 5 U.S.C. (1964 ed.) 863.

ment. The House Committee Report that accompanied the 1964 amendment noted that NSA employees had been "administratively excepted by the U.S. Civil Service Commission, pursuant to Executive Order 10440 of March 31, 1953, from the competitive civil service and placed in Schedule A." H.R. Rep. 108, 85th Cong., 1st Sess. 5 (1963). (Schedule A listed those employees in the excepted service. See *Vitarelli* v. *Seaton*, 359 U.S. 535, 539 (1959).) The "[s]tatutory exemption" provided by Section 306(a), the report observed (H.R. Rep. 108, *supra*, at 5), "obviates the possibility that the present excepted employment authority, granted administratively by the Civil Service Commission, might be withdrawn or amended."

NSA employees are thus in the "excepted service" for purposes of the CSRA. See Civil Service Rules § 1.4(a), *reprinted in* 5 U.S.C. 3301 note (defining "excepted service" to include "all civilian positions in the executive branch of the Government which are specifically excepted from the requirements of the Civil Service Act or from the competitive service by or pursuant to statute" or by administrative determination). Under Subchapter II of Chapter 75 of the CSRA, preference-eligible veterans in the excepted service may be removed "only for such cause as will promote the efficiency of the service" (5 U.S.C. 7513(a)). Nonveterans at NSA, including respondent, are not covered by Subchapter II (see 5 U.S.C. 7511(a)) and may be removed without cause except as the agency otherwise provides by regulation. See *United States* v. *Fausto*, slip op. 7-9.[8]

[8] NSA employees are also denied most of the limited protections afforded to excepted-service employees by other chapters of the CSRA: Congress excluded the NSA by name from both Chapter 23, barring certain "[p]rohibited personnel practices" (see 5 U.S.C. 2302(a)(2)(C)(ii)), and Chapter 43, governing personnel actions based on unacceptable job performance (see 5 U.S.C. 4301(1)(C)(ii)).

NSA has provided by regulation that an employee may be removed only for "such cause as will promote the efficiency of the service" (NSA/PMM § 370.3-4). NSA employees also share with their CSRA counterparts a right to advance written notice of an adverse action, an opportunity to respond and be represented by counsel, and a written decision (§§ 370.3-5 to 370.3-7). Preference-eligible veterans employed at NSA, like preference eligibles elsewhere in government (see 5 U.S.C. 7511(a)(1)(B)), have the right to appeal an adverse action to the MSPB (NSA/PMM § 370.3-8a(1)). Nonveterans at NSA, however, may not appeal adverse actions to the MSPB (§ 370.3-8a(2)), just as other nonveterans in the excepted service have no right of MSPB appeal under the CSRA (5 U.S.C. 7501(1)).

There is no suggestion in the opinion below, nor has petitioner ever contended, that these regulations are beyond the power of NSA. To the contrary, at least with respect to non-preference eligibles, the regulations circumscribe what would otherwise be NSA's power to remove employees without cause. In sum, the Director of NSA clearly has at least as a general matter the authority to remove employees for cause pursuant to procedures specified in NSA's regulations.[9]

2. As a general rule, failure to satisfy a lawful requirement for a position constitutes "cause" for removal from that position. See, *e.g.*, *Department of Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988) (denial of required clearance);

[9] In *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546 (1985), the Court held that due process requires that a tenured public employee be given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." To the extent that the NSA regulations themselves create such "tenure" rights, the requirements of due process outlined in *Loudermill* are fully satisfied by the regulations.

Tennessee v. *Dunlap*, 426 U.S. 312 (1976) (loss of required National Guard enlistment); *Zimmerman* v. *Department of Army*, 755 F.2d 156 (Fed. Cir. 1985) (loss of required Army Reserve status); *Buriani* v. *Department of Air Force*, 777 F.2d 674 (Fed. Cir. 1985) (failure to receive Air Force Reserve promotion required for civilian position); *Jackson* v. *United States Postal Service*, 666 F.2d 258 (5th Cir. 1982) (inability to perform physical requirements of job); *Womer* v. *Hampton*, 496 F.2d 99 (5th Cir. 1974) (dual employment in violation of conflict of interest regulations); *Almazan* v. *Department of Air Force*, 26 M.S.P.R. 318 (1985) (lack of physical and mental ability to perform duties of position).

Clearance for access to SCI is a continuing requirement for employment at NSA. Section 831 (emphasis added) provides that "no person shall be employed in * * * the National Security Agency * * * *or continue to be so employed* * * * [or] have access to any classified information[] unless such employment * * * or access to classified information is clearly consistent with the national security." Section 832(a) provides that "[n]o person shall be employed in, or detailed or assigned to, the Agency unless he has been the subject of a full field investigation in connection with such employment, detail, or assignment, and is cleared for access to classified information in accordance with the provisions of this subchapter."

Sections 831 and 832 authorize, and NSA's regulations establish, procedures by which it may be determined that an existing employee's access to SCI is no longer "clearly consistent with the national security"—with the consequence that the employee must be removed. Section 831 directs the Secretary to prescribe regulations "relating to continuing security procedures" sufficient to assure that

an individual's "continu[ed]" employment is clearly consistent with the national security. The Secretary has promulgated such regulations and NSA followed them here. See DoD Directive No. 5210.45 (May 9, 1964) (C.A. App. 73-76); NSA Reg. No. 30-4 (June 22, 1964) (C.A. App. 77-81).[10]

Section 832(b), which applies to continuing as well as initial clearance determinations,[11] provides that, "in those cases in which the Director of the Agency determines that there is a doubt whether [the employee's] access to that information would be clearly consistent with the national security," a board of appraisal "shall submit a report and

[10] Both NSA Reg. No. 30-4 (C.A. App. 78) and DoD Directive 5210.45 para. IV.B (C.A. App. 74) require boards of appraisal to apply criteria for access to classified information established by the United States Intelligence Board (USIB). The USIB has been abolished, and the Director of Central Intelligence now establishes the relevant criteria. The substantive security standards governing access to SCI are set forth in Director of Central Intelligence (DCID) Directive No. 1/14 (Sept. 1 1983), copies of which have been lodged with the Clerk. In determining whether an employee's continued access to SCI is "clearly consistent with the national security," therefore, a board of appraisal must apply the criteria of DCID 1/14. See DCID 1/14, Annex B; Bonanni Declaration ¶ 6 (C.A. App. 42). The board of appraisal's recommendation in this case accordingly concluded that respondent "d[id] not meet the minimum standards for access to Sensitive Compartmented Information (SCI) as prescribed in DCID 1/14" (C.A. App. 106).

[11] Section 832(b) establishes procedures for "assist[ing] the Secretary and the Director of the Agency in carrying out their personnel security responsibilities," responsibilities that are defined in Section 831 to include ensuring that no employee at NSA shall "continue to be so employed" and have access to classified information unless such continued employment and access is "clearly consistent with the national security."

recommendation on each such a case." Section 832(b) further provides that no person may be cleared for access to classified information "contrary to the recommendations of any such board" unless the Secretary or his designee "shall make a determination in writing that such employment * * * or access to classified information is in the national interest."

Since clearance for access to SCI is a statutory requirement for employment at NSA, loss of that clearance plainly constitutes "cause" for removal.[12] The fact that the clearance requirement relates to national security does not affect the fact that the failure to satisfy this requirement is cause for removal. To the contrary, in *Cole* v. *Young*, 351 U.S. 536, 543 (1956), this Court expressly noted that doubts as to the loyalty of an employee could constitute "cause" for dismissal under the Veterans' Preference Act (§ 14, 58 Stat. 390). "The general personnel laws," the Court observed (351 U.S. at 543 (footnote omitted)), "authorize dismissals for 'such cause as will promote the efficiency of the service,' and * * * a reasonable doubt as to [an employee's] loyalty * * * was recognized as a 'cause' for dismissal under those procedures as early as 1942." If doubts as to the loyalty of an employee constitute "cause" for dismissal then, *a fortiori*, loss of a statutorily required clearance for access to classified information constitutes "cause" for removal. See *Egan* v. *Department of Navy*,

[12] The court of appeals wrongly characterized the requirement of SCI clearance as a mere "administrative rule authorized by the 1964 Act" (Pet. App. 11a). Section 832(a) expressly requires all NSA employees to be cleared for "access to sensitive cryptologic information or material," which is a capsule definition of SCI (see Pet. App. 46a-47a). In any event, however, whether clearance for access to SCI is a statutory or an administrative requirement for employment at NSA is irrelevant. The crucial point is that such access is a *legitimate* requirement that every NSA employee must satisfy.

802 F.2d 1563, 1568-1569 (Fed. Cir. 1986), rev'd on other grounds, No. 86-1552 (Feb. 23, 1988); *Stalans* v. *National Security Agency*, 678 F.2d 482, 483 (4th Cir. 1982); *Hoska* v. *Department of Army*, 677 F.2d 131, 136 (D.C. Cir. 1982).[13]

3. Contrary to respondent's contention (Br. in Opp. 2-3 & n.1), NSA clearly invoked its "for cause" removal procedures in this case. Respondent received a "notice of proposed action to remove you * * * in accordance with the provisions of NSA/CSS Personnel Management Manual (PMM) 30-2, Chapter 370" (C.A. App. 82). Chapter 370 sets forth in Section 3 (Pet. App. 38a) the standards and procedures for removing an employee and specifically provides that an employee may be removed pursuant to that section only for "such cause as will promote the efficiency of the service." When respondents' counsel requested (C.A. App. 218-219) a pre-removal hearing pursuant to 5 U.S.C. 7532, NSA replied (C.A.

[13] "Loyalty" is of course quite a different matter from the constellation of considerations appropriately underlying the determination to grant or deny a security clearance. As this Court noted in *Department of Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988), slip op. 9-10 (quoting *Molerio* v. *FBI*, 749 F.2d 815, 824 (D.C. Cir. 1984)):

> A clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States. "[T]o be denied [clearance] on unspecified grounds in no way implies disloyalty or any other repugnant characteristic."

DCID 1/14, Annex A sets out 10 general factors, in addition to "unquestioned loyalty to the United States," that are relevant to the clearance determination.

App. 220) that the removal was not pursuant to Section 7532, but rather "in accordance with NSA/PMM Chapter 370." Thus, NSA again made clear its intention to rely upon its "for cause" regulations in removing respondent.

NSA fully complied with its procedures governing "for cause" removals. As required by NSA/PMM § 3-5 (Pet. App. 39a), respondent received "advance written notice of the proposed action * * * stating the specific reasons for the proposed action" (see C.A. App. 83-84); an opportunity "to answer orally, in writing or both, and to furnish affidavits and other documentary evidence in support of the answer" (see Pet. App. 2a-3a; C.A. App. 121-144, 147-174, 183-190); representation "by an attorney or other representative" (see C.A. App. 85); and "a written decision with the specific reasons therefor" (see *id.* at 191-192). NSA convened a board of appraisal pursuant to 50 U.S.C. 832(b), which concluded that respondent's continued access to SCI was not clearly consistent with the interests of national security (C.A. App. 106-108). In addition, although not required by the regulations, respondent in this case received a personal meeting with the Director of NSA before the Director issued his final decision (*id.* at 191).

The "cause" for respondent's removal was, of course, related to national security: clearance for access to SCI is a continuing statutory requirement for employment at NSA, and the determination that respondent's access to SCI was no longer "clearly consistent with the national security" (50 U.S.C. 831) therefore required respondent's removal. But respondent's contention that NSA cannot properly have invoked its "for cause" removal procedures, because the cause for removal involved national security, cannot rest on any inherent limitation on the authority of the Director of NSA, pursuant to the 1959 NSA Act and its implementing regulations, to remove employees for cause.

As explained above, failure to satisfy a legitimate requirement of employment is "cause" for dismissal under well-established principles. Respondent was, therefore, properly dismissed for cause unless some *other* statute limits the power of the Director of NSA to dismiss employees for reasons relating to national security. The court of appeals found such limitations in 50 U.S.C. 833 and 5 U.S.C. 7532. But neither statute imposes any such limitation.

B. The Authority Of The Director Of NSA To Remove Employees For Cause Is Not Limited By 50 U.S.C. 833.

Section 833, which grants the Secretary of Defense unreviewable authority to dismiss an employee in the interest of the United States, does not impose any limitation on the authority of NSA to remove an employee under its "for cause" procedures for failure to maintain a required security clearance. By its terms, Section 833 is plainly a permissible alternative mechanism for terminating NSA employees in certain cases, not an exclusive path for all terminations touching upon national security concerns. Section 833 says only that the Secretary "may" terminate an individual's employment under certain conditions; it does not purport to afford a mandatory procedure under any circumstances. To the contrary, in order to invoke Section 833, the Secretary of Defense must find that "the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security" (50 U.S.C. 833(a)). This language clearly implies not only that removals may be effected under "other provisions of law" but also that other provisions are to be used unless the procedures they prescribe would themselves threaten national security. DoD Directive No.

5210.45 (May 9, 1964) (C.A. App. 75) accordingly provides that Section 833(a) is a last resort:

> When the two conditions [in Section 833] do not exist, the Director, NSA, shall, when appropriate, take action pursuant to other provisions of law, as applicable, to terminate the employment of a civilian officer or employee. The Director shall recommend to the Secretary of Defense the exercise of the authority of [Section 833] only when the termination of the employment of a civilian officer or employee cannot, because of paramount national security interests, be carried out under any other provision of law.

That Congress intended to allow "for cause" removals on national security grounds is also clear from the preamble to 50 U.S.C. 833, which provides that the Secretary's authority may be exercised "[n]otwithstanding sections 7512 and 7532 of title 5." The reference to 5 U.S.C. 7512 is to the "for cause" dismissal protections of the CSRA, protections that are due by statute to preference-eligible NSA employees and that, with the exception of MSPB review, have been afforded by regulation to all other NSA employees. The reference to both Section 7512 and Section 7532 clearly indicates that Congress assumed that removals for cause would continue to occur even in cases with national security implications. See also 50 U.S.C. 832(b) (authorizing boards of appraisal to submit reports and make recommendations on access to classified information, but providing that "appraisal by such a board is not required before action may be taken under sections 7512 and 7532 of title 5, or any other similar provision of law").[14]

---

[14] The court of appeals quoted (Pet. App. 11a-12a) both these provisions, but excised the two references to Section 7512. The court then

The court of appeals stated (Pet. App. 13a) that permitting NSA employees to be removed for cause for failure to maintain a security clearance "would render § 833 entirely superfluous." That is plainly incorrect. As outlined above, preference-eligible NSA employees are entitled by statute to a number of procedural protections in connection with a "for cause" removal, including MSPB review, and other employees are entitled by regulation to some of these protections. Section 833 permits the Secretary of Defense, acting in person, in cases in which these procedures "cannot be invoked consistently with the national security," to sweep aside these protections and take immediate and unreviewable action to remove an employee "in the interest of the United States." Far from being superfluous, Section 833 is important to the ability of the Secretary of Defense to protect the national security: it enables him to bypass statutory and other tenure protections of employees where security considerations require; the fact that respondent is a non-preference-eligible, who has no statutory tenure protection in the first place, does not render Section 833 superfluous.

C. The Authority Of The Director Of NSA To Remove Employees For Cause Is Not Limited By 5 U.S.C. 7532

The court of appeals' conclusion that Section 7532 displaces the authority of the Director to remove an employee for cause for failure to maintain a required security clearance runs directly counter to the language of the statute, its legislative history, and prior decisions of this Court and the Federal Circuit. Section 7532 has broader scope than Section 833(a): it gives the heads of several specified agencies the power of removal upon an affirmative determination that such action is necessary or advisable in the interests of national security. But like Section 833(a), Section 7532 is not an exclusive procedure but a means of bypassing the usual methods of removing federal employees where exigent circumstances require. Neither the interests of national security nor the interests of employees would be served by turning it into a mandatory substitute for normal removal procedures.

1. Congress enacted the predecessor of Section 7532 (the Act of Aug. 26, 1950, ch. 803, § 1, 64 Stat. 476-477 (1950 Act)) to give the heads of certain executive agencies the power to take immediate action when necessary to protect the national security. See, *e.g.*, S. Rep. 2158, 81st Cong., 2d Sess. 2 (1950); H.R. Rep. 2330, 81st Cong., 2d Sess. 2 (1950). From the standpoint of both the agency head and the affected employee, it is a drastic remedy. The agency head must act personally and must make affirmative findings that a suspension is "necessary" and then that a removal is "necessary or advisable" in the interests of national security. The employee may be suspended summarily, without process and without pay, and may be removed "after such investigation and review as [the agency head] considers necessary." Permanent employees are entitled, "after suspension and before removal," to notice of charges "as specific[] as security considerations permit," an opportunity to respond, and a hearing "by an agency authority duly constituted for this purpose." 5 U.S.C. 7532. The statute provides that "[t]he determination of the head of the agency is final" (5 U.S.C. 7532(b)), *i.e.*, there is no outside review (*Cole* v. *Young*, 351 U.S. at 546). An

---

asserted (Pet. App. 12a), based on the elided quotations, that Section 7532 was the only alternative mechanism to Section 833 for removing NSA employees on grounds of national security. But the express references to the ordinary "for cause" procedures cannot be so easily ignored. They clearly indicate Congress's intention not only that loss of a security clearance could be cause for dismissal but also that the "for cause" procedures should be used unless they "cannot be invoked consistently with the national security" (50 U.S.C. 833(a)).

employee removed under Section 7532 is not eligible for any position in the agency and may not be appointed to any position elsewhere in the government prior to consultation with OPM (5 U.S.C. 7312).

It is clear from its language that Congress did not intend the summary authority in Section 7532 to be the exclusive means of removing an employee who ceases to qualify for access to classified information. Section 7532 states that an agency head "may" suspend and thereafter remove an employee in specified circumstances. Section 7532 is not by its terms a mandatory procedure in any case.[15] Moreover, Section 7532 states that the agency head may employ its summary procedures "[n]otwithstanding other statutes." The clear implication of that phrase, in conjunction with the permissive "may," is that the agency head may use the summary authority in Section 7532 "[n]otwithstanding [substantive or procedural protections the employee would otherwise have under] other statutes." The words "other statutes" make sense only as referring to statutory provisions, like Subchapter II of Chapter 75, that otherwise permit employees to be removed only "for cause" and afford other protections. The fact that respondent was not protected by Subchapter II does not change the meaning of Section 7532.

The court of appeals' statement that Section 7532 "expressly controls terminations in the interests of national security" (Pet. App. 10a) thus stands the relationship between Subchapter II and Section 7532 on its head. Section 7532 enables the head of an agency to bypass "for cause" removal procedures in the interests of national security,

[15] Indeed, if ordinary removal procedures can be safely employed without compromising national security then it would seem to follow that the suspension without pay that begins the summary procedures of Section 7532 is not "necessary in the interests of national security."

but it does not state or imply that loss of a required clearance is not "cause" for removal in the ordinary manner. The procedures of Section 7532 "may" be invoked "[n]otwithstanding any other statutes," but nothing in Section 7532 purports to preclude removal actions taken pursuant to "any other statutes." Section 7532 is, by its plain terms, an "extra option" (Pet. App. 9a) for the removal of employees who pose a security risk.

2. It is also clear from the legislative history that Section 7532 was not intended to be used routinely, but only when there is an immediate risk to the national security. See *Cole* v. *Young*, 351 U.S. at 546. The proponents of the statute gave assurances that it would be used sparingly and cautiously and only when other, normal procedures were insufficient to protect the national security. See, *e.g.*, *Hearing on S. 1561 and S. 1570 Before a Subcomm. of the Senate Comm. on Armed Services*, 80th Cong., 2d Sess. 2-3 (1948) [hereinafter *Hearing*] (statement of Mark Edwin Andrews, Assistant Secretary of the Navy: "It is our intention to utilize the provisions of this law only in the exceptional cases where no other speedy and sure method is available to protect the national security. * * * * * I wish to reemphasize that the Navy does not intend to use this summary-dismissal legislation * * * except in the most unusual cases.").

The legislative history also confirms that Section 7532 was not designed to provide employees who do not otherwise have statutory tenure with across-the-board protections against dismissals in the interests of national security. Rather, it was designed to cut through the ordinary procedures for suspending and subsequently removing employees protected by other provisions in those circumstances in which such summary action was "neces-

sary in the interests of national security" (5 U.S.C. 7532(a)). See H.R. Rep. 2264, 80th Cong., 2d Sess. 1-2 (1948); S. Rep. 1155, 80th Cong., 2d Sess. 2 (1948); H.R. Rep. 2330, 81st Cong., 2d Sess. 2 (1950); S. Rep. 2158, 81st Cong., 2d Sess. 2 (1950); 96 Cong. Rec. 10028 (1950) (remarks of Rep. Thornberry); *id.* at 10029 (remarks of Rep. Murray).[16] The Act was intended, not to circumscribe, but "to *increase* the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security

[16] The State Department, in a letter quoted in the Senate Report, explained why this additional flexibility, primarily with respect to suspensions, was considered necessary (S. Rep. 2158, *supra*, at 6):

> The bill, when enacted into law, would give the Secretary of State, under permanent authority, a desired flexibility of action not open to him under either the civil-service rules and regulations or loyalty regulations promulgated by the Civil Service Commission. Under existing civil-service rules and regulations, there is no authority to summarily suspend the employment of a permanent employee of the Department without first notifying that employee of the reasons for suspension and affording him an opportunity to reply. The Department feels that such flexibility of action is necessary to the successful operation of an effective personnel-security program, and to counteract the objectives of subversive forces, groups and individuals whose activities are considered incompatible with the interests of the United States.

As the Assistant Secretary of the Navy succinctly expressed the purpose of the bill in his testimony (see *Hearing* 2), "[t]his law might be likened to the shotgun behind the door. We prefer not to use it but if we meet the situation where it must be used we want it to be available." See *id.* at 4 (statement of Hamilton Robinson, Director, Office of Controls, Department of State) (stressing the "very infrequent" need "to eliminate immediately the risk presented by an insecure employee, without the necessity of awaiting the conclusion of lengthy termination proceedings"). See also *id.* at 7 (statement of Arthur Flemming, Commissioner, Civil Service Commission) (summarizing "the regular procedures that are followed in the removal of employees in the executive branch of the Government").

risks, and to terminate their services if subsequent investigation develops facts which support such action." S. Rep. 2158, 81st Cong., 2d Sess. 2 (1950) (emphasis added).

As the Committee Reports noted, the heads of most of the agencies expressly covered by the 1950 Act (see 5 U.S.C. 7531), already had on a temporary basis "the authority which is made permanent under the provisions of the bill." H.R. Rep. 2330, *supra*, at 3. See also S. Rep. 2158, *supra*, at 2-3; H.R. Rep. 2264, *supra*, at 2. This authority to summarily suspend and terminate employees when necessary in the interests of national security was granted to the Army, the Navy and the Air Force during World War II and was continued after the war and extended to the Atomic Energy Commission in 1946 and to the Departments of State and Defense in a series temporary riders to appropriations bills.[17] Under these temporary measures the agency heads had "more drastic powers than contemplated in" the 1950 Act (S. Rep. 2158, *supra*, at 2). "Under present law," the House Report explained (H.R. Rep. 2330, *supra*, at 3), "with respect to the foregoing departments and agencies, the officer or employee who is suspended or terminated as a security risk is not entitled as a matter of right to an appeal to the head of the agency concerned. This legislation extends this appeal right to employees of the Departments of State, Army, Navy, Air Force, the Office of the Secretary of Defense, and the Atomic Energy Commission."

[17] See the Act of June 28, 1940, ch. 440, § 6, 54 Stat. 679; the Act of Dec. 17, 1942, ch. 739, § 3, 56 Stat. 1053; the Department of State Appropriation Act, 1947, ch. 541, 60 Stat. 458; the Atomic Energy Act of 1946, ch. 724, § 12(a)(4), 60 Stat. 771; the Department of State Appropriation Act, 1948, ch. 211, 61 Stat. 288; the Department of State Appropriation Act, 1949, ch. 400, § 104, 62 Stat. 315; the Department of State Appropriation Act, 1950, ch. 354, § 104, 63 Stat. 456; the National Military Establishment Appropriation Act, 1950, ch. 787, § 630, 63 Stat. 1023.

The court of appeals quoted this passage from the House Report out of context and then stated (Pet. App. 9a) that it "effectively shoots down the theory that § 7532 is only an extra option for agencies wishing to fire employees as national security risks." Read in its historical context, however, the passage shows that Section 7532 was indeed an "extra option." The 1950 Act, from which Section 7532 derives, extended an extraordinary wartime authority into peacetime, but it added some procedural protections that did not exist in the wartime versions. Both the wartime and the peacetime versions, however, were extraordinary measures to be used in exigent circumstances, not mandatory means of removing employees who fail to meet job qualifications, merely because security considerations are implicated. Section 7532 is still "the shotgun behind the door" to be used "only in the exceptional cases where no other speedy and sure method is available to protect the national security" (*Hearing* 2).[18]

[18] The court of appeals found (Pet. App. 8a-9a) further support for its reading of Section 7532 in the predecessor of 5 U.S.C. 7533, Section 2 of the 1950 Act (64 Stat. 477), which provided that "[n]othing herein contained shall impair the powers vested in the Atomic Energy Commission by the Atomic Energy Act of 1946 or the requirements of section 12 of that Act that adequate provision be made for administrative review of any determination to dismiss any employee of said Commission." The court of appeals stressed (Pet. App. 9a) that "Congress did not provide any equivalent provision for any other agency covered by § 7532" and viewed that fact as evidence that all national security dismissals in those agencies must proceed under Section 7532. But there was good reason for dealing separately with the AEC, because the AEC had been given a much broader removal power than the special wartime powers given to the other agencies. Section 12(a)(4) of the Atomic Energy Act of 1946, ch. 724, 60 Stat. 771, gave the AEC a general authority to discharge employees "without regard to [the civil-service laws]" whenever "the Commission deems such action necessary to the discharge of its responsibilities." It was this extremely broad and extremely summary special removal power that was not to be displaced by the 1950 Act. This in no way implies that Congress *did* mean to displace the ordinary power of the AEC and every other agency to remove employees for cause.

3. The court of appeals suggested (Pet. App. 9a) that to allow NSA to remove an employee "for cause," after revocation of his security clearance, would allow NSA to "bypass" the procedural protections of Section 7532. Again, this puts the matter backwards. Ordinary "for cause" procedures afford many federal employees (including preference eligibles at NSA) important protections against removal. NSA and other agencies are not allowed to bypass these procedures by invoking the summary procedures of Section 7532 except in appropriate cases. As this Court noted in *Cole* v. *Young*, 351 U.S. at 547, "the 1950 Act, though in form but an exception to the general personnel laws, could be utilized effectively to supersede those laws." The Court accordingly restricted the use of the 1950 Act to those extraordinary circumstances in which there is "an immediate threat of harm to the 'national security' " such that the delay incident to the "normal dismissal procedures" could "cause serious damage to the national security" (351 U.S. at 546). The fact that respondent, as a non-preference-eligible in the excepted service, has *no* statutory tenure, does not change the nature of Section 7532.

The court of appeals apparently reasoned (Pet. App. 12a-13a) that respondent would receive more protection under Section 7532 than in a "for cause" removal, and that therefore the former procedure must displace the latter. But the premise is wrong and the conclusion does not follow: respondent received greater protection under NSA regulations than he would have received had Section 7532 been invoked; and the fact that non-preference-eligible

NSA employees are statutorily excluded from civil service protection does not turn Section 7532, a supplementary procedure applicable to a wide range of federal employees, into an exclusive means of removing NSA personnel.

Under NSA regulations, respondent could be removed only for cause and was entitled to written notice, an opportunity to respond and be represented by counsel, and a written decision. His case was reviewed, first, by a board of appraisal and then by the Director of NSA, who met with respondent and his counsel. Had respondent been a veteran, he would also have had a right of appeal to the MSPB. Respondent was kept on pay status for a period of 16 months while his case was being considered. When the board of appraisal determined that respondent's access to SCI was no longer "clearly consistent with the national security," it nonetheless recommended that NSA endeavor to help respondent find employment elsewhere.[19]

This treatment contrasts sharply with what respondent could have expected under Section 7532, which is designed primarily to deal with immediate threats to national security: summary suspension without pay, notice only to the extent consistent with national security, a single hearing of unspecified scope,[20] and, if the determination were

[19] Although all positions at NSA require SCI clearance, that is not true elsewhere in the Department of Defense or in other agencies.

[20] There has been no authoritative determination of what sort of hearing is required under Section 7532. We note that Section 7532(c)(3)(A) provides that the employee is entitled to a statement of reasons only "stated as specifically as security considerations permit." Section 7532(c)(3)(C) then requires only "a hearing, at the request of the employee, by an agency authority duly constituted for this purpose." In *Egan*, slip op. 14-15, the Court stated that even if Section 7532 entitled the employee to a "trial-type hearing" prior to removal, "we doubt whether removal under § 7532 * * * would have amounted to 'more' procedural protection" than provided under the Navy's "for cause" procedures.

made to remove him, ineligibility for any other position in the Department of Defense or, prior to consultation with OPM, for appointment elsewhere in government. NSA employees would be ill-served if Section 7532 became the standard procedure for all removals based on considerations of national security. In *Egan*, slip op. 14, this Court reviewed the procedures available under Section 7532 and rejected the employee's contention that he "would have received greater procedural protections under § 7532 than he received" under the Navy's "for cause" procedures—procedures comparable to those provided by NSA. Section 7532, the Court stressed (*Egan*, slip op. 14), "provides a procedure that is harsh and drastic both for the employee and for the agency head, who must act personally in suspending and removing the employee."

In any event, the fact that nonveterans at NSA have no statutory tenure protection does not imply that Section 7532 is the exclusive means of removing them. Section 7532 applies to employees of many agencies (see pages 39-40, *infra*), including employees in the competitive service, who do have civil service protection and who receive statutory protections in a "for cause" removal that they do not receive when Section 7532 is invoked.[21] The emergency procedure permitted by Section 7532 does not become a mandatory procedure just because non-preference-eligible personnel of a particularly sensitive agency have been deliberately shorn of statutory protection and relegated to such protections as the agency pro-

[21] A competitive-service employee or veteran removed for cause for failure to obtain or retain a required security clearance is entitled, under 5 U.S.C. 7513, to MSPB and judicial review in addition to agency procedures. See *Department of Navy* v. *Egan, supra*. The Court in *Egan* held that the substance of the clearance determination is not reviewable, but this outside check on the procedures followed by the agency offers a protection wholly unavailable under Section 7532.

vides by regulation. Cf. *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 8-9 (employees who are deliberately excluded from the comprehensive remedial scheme of the CSRA may not obtain from other statutory sources the protections denied them in the CSRA). Furthermore, the court of appeals overlooked the procedures afforded to all NSA employees by regulation. By ignoring the procedures that respondent actually received, the court of appeals has endorsed fewer and harsher procedures for employees generally.

4. The court of appeals' reading of Section 7532 conflicts with this Court's interpretation of the 1950 Act in *Cole* v. *Young*, *supra*. The question in that case was whether an employee of the Department of Health, Education and Welfare could be dismissed on loyalty grounds pursuant to the 1950 Act or was entitled to the "for cause" procedures provided by the Veterans' Preference Act of 1944. This Court noted (351 U.S. at 543) that the summary removal authority granted to agency heads by the 1950 Act is "not the only, nor even the primary, source of authority to dismiss Government employees." The Court stressed (351 U.S. at 544 (emphasis in original)) that "there was no want of substantive authority to dismiss employees on loyalty grounds, and [therefore] the question for decision here is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case." After examining the language and history of the 1950 Act, the Court held (351 U.S. at 543, 546) that the employee's dismissal "violated the Veterans' Preference Act" because "[i]n the absence of an immediate threat of harm to the 'national security,' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears."

The Director of NSA followed *Cole* to the letter in this case. Doubts about whether respondent's continued employment would be consistent with the national security were sufficient to require revocation of his clearance and his consequent removal.[22] But in the absence of an "immediate threat" to the national security, resort to the summary procedures of 5 U.S.C. 7532 was unnecessary, and NSA properly relied upon its "normal dismissal procedures." The court of appeals erred in concluding that the possibility of summary termination under Section 7532 somehow precluded a "for cause" removal of respondent.

The decision of the court of appeals is also inconsistent with recent decisions of the MSPB and the Federal Circuit, which have wide responsibility for federal personnel matters. In *Egan* v. *Department of Navy*, 28 M.S.P.R. 509 (1985), rev'd on other grounds, 802 F.2d 1563 (Fed. Cir. 1986), rev'd, No. 86-1552 (Feb. 23, 1988), a civilian employee of the Navy was removed "for cause" from his job at the Trident Naval Refit Facility in Bremerton, Washington, after being denied a security clearance required by his job. He sought review from the MSPB of the merits of the security clearance determination. The MSPB concluded that, although it could review the procedures utilized by the agency in denying the clearance and removing Egan, it "ha[d] no authority to review the agency's stated reasons for the security clearance determination" (28 M.S.P.R. at 519). The MSPB explicitly decided that the Navy could properly employ its "for cause" procedures in removing an employee who loses or is denied a required security clearance, and was not required to follow the procedures set forth in 5 U.S.C. 7532. The MSPB, after de-

---

[22] DCID 1/14 ¶ 11 provides that "[a]ny doubt concerning personnel having access to SCI should be resolved in favor of the national security and the access should be denied or revoked."

liberately inviting and receiving briefs on the question (see 50 Fed. Reg. 2355 (1985); 49 Fed. Reg. 48623 (1984)), concluded (relying in part on *Cole* v. *Young*, *supra*) that resort to Section 7532 was not even appropriate, much less mandated, in every case in which an employee was removed for loss of a required security clearance (28 M.S.P.R. at 520). The Board accordingly held "that section 7532 is not the exclusive basis for removals based upon security clearance revocations" (28 M.S.P.R. at 521).

On appeal, the Federal Circuit affirmed that aspect of the Board's decision. The Federal Circuit cited *Cole* v. *Young*, *supra*, and noted (802 F.2d at 1568) that "[t]here is nothing in the text of section 7532 or its legislative history to suggest that its procedures were intended to preempt section 7513 procedures whenever the removal could be taken under section 7532." The court stressed that "[t]he language of section 7532 is permissive" and concluded "that Congress intended to provide the agencies with procedural flexibility in effecting the removal of government employees on national security grounds" (802 F.2d at 1568). Accordingly, the court held (*id.* at 1568-1569), "such removal may be brought under either section 7512 or section 7532" and "[t]he agency is responsible for selecting the removal procedure in the particular circumstance."[23]

5. The court of appeals' decision is simply irreconcilable with the statutory mandate that "no person shall be employed in" the Agency or have "access to any classified

[23] The Federal Circuit nonetheless reversed the MSPB, concluding that the Board was required to examine the merits of the underlying security clearance determination in reviewing the "cause" for Egan's dismissal. In reversing the court of appeals on that ground, this Court left open the question whether removals based on lack of security clearance could proceed only under 5 U.S.C. 7532 (*Egan*, slip op. 13 & n.7).

information" unless such employment or access is "clearly consistent with the national security" (50 U.S.C. 831). If the employee fails to meet that "clearly consistent" standard and hence is no longer permitted by statute to have access to classified information, the statute requires that his employment not continue (*ibid.*). Removal under Section 7532, by contrast, requires an affirmative finding that removal is "necessary or advisable in the interests of national security." That is a different standard: a determination to deny access to SCI, on the ground that it is no longer "clearly consistent with the national security," does not necessarily mean there is an immediate danger to national security sufficient to invoke Section 7532. It does, however, mean that the employee no longer satisfies a statutory condition of his employment. Cf. *Department of Navy* v. *Egan*, slip op. 12.

6. The court of appeals' ruling would lead to mischief extending well beyond NSA. The court ruled that a general authority to remove employees for cause is displaced in cases involving national security by 5 U.S.C. 7532. But Section 7532 has no special application to NSA; it also applies to other parts of the Department of Defense and a number of other departments and agencies (see note 4, *supra*). Employees subject to removal under Section 7532 include employees in the competitive service who may be removed "for such cause as will promote the efficiency of the service" under 5 U.S.C. 7512-7513. Neither the court of appeals nor respondent has suggested any reason why, if Section 7532 displaces the "for cause" removal authority of NSA where the "cause" involves national security, it would not similarly displace the "for cause" provisions applicable to competitive-service employees and veterans at other agencies.[24] If it does, then every routine decision to

[24] The court of appeals did stress (Pet. App. 9a) that Section 7532 predates the 1959 NSA Act, but statutes are normally more easily read

revoke a required clearance would require procedures suitable to an immediate threat to national security, including the personal attention of the head of the agency. Even if the "necessary or advisable" standard of Section 7532 could be stretched to accommodate such cases (as would be necessary if the "clearly consistent" test of 50 U.S.C. 831 and other statutes is to be complied with), the burden upon the agencies and consequent inefficiency would greatly handicap efforts to protect the national security.

Finally, the court of appeals overlooked an additional difficulty that would result from its decision. The line between removals for reasons of national security and removals that "promote the efficiency of the service" in other ways is not always clear: for example, an employee found selling drugs, or engaging in theft or other dishonest conduct, might be subject to a "for cause" removal for the misconduct itself and also to revocation of his security clearance on the ground that his continued access to classified information is not "clearly consistent with the interests of the national security." If removals on national security grounds *must* proceed under Section 7532, then agencies, the MSPB, and the courts would become enmeshed in disputes over whether any given removal was or was not on national security grounds. The court of appeals' notion that an employee may *not* be removed for cause for failure to maintain a required clearance is plainly wrong.

---

to displace prior enactments than subsequent ones. In any event, whatever the relevance of that point, Section 7532 also predates the Civil Service Reform Act of 1978.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
LOUIS R. COHEN
Deputy Solicitor General
MICHAEL K. KELLOGG
Assistant to the Solicitor General
BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys

MAY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60431